No. 628

In the Supreme Court of the United States

OCTOBER TERM, 1942

INTERSTATE COMMERCE COMMISSION, J. M. KURN AND JOHN G. LONSDALE, TRUSTEES OF THE ST. LOUIS SAN FRANCISCO RAILWAY COMPANY, AND ILLINOIS CENTRAL RAILWAY COMPANY, APPELLANTS

v.

COLUMBUS AND GREENVILLE RAILWAY COMPANY, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI EASTERN DIVISION

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION, APPELLANT

March 1943

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OPINIONS BELOW

The opinion of the specially constituted District Court (R. 66) is reported in 46 Fed. Supp. 204. The reports of the Interstate Commerce Commission involved (R. 5, 56) are reported in 238 I. C. C. 309 and 248 I. C. C. 441.

JURISDICTION

The final decree of the District Court (R. 71) was entered August 17, 1942, and the appeal was allowed October 14, 1942 (R. 76). Probable jurisdiction was noted February 1, 1943. The Court's jurisdiction rests on the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 210, 219; 28 U. S. C. Supp. III, secs. 45 and 47a) and section 238 of the Judicial Code as amended by the Act of February 12, 1925 (c. 229, 43 Stat. 936, 938, par. (4), 28 U. S. C., sec. 345).

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix.

QUESTIONS PRESENTED

The appellee railroad, whose line extends from Columbus to Greenville, both in Mississippi, serves together with other railroads certain mill points where cottonseed, transported from country origins in Mississippi and other States, is processed into products which subsequently are transported to marketing destinations. Under the tariffs of all the railroads, including tariff of the appellee: While the individual railroad must collect its full local rate at the mill point on an inbound shipment of cottonseed from a station on its lines, provision is made for a refund where the outbound shipment of processed products is

also made over its lines, the proffered refund being in every case based on the weight of the inbound shipment and length of haul from origin to mill point. The tariff of the appellee, however, in addition to holding out such refund, provides for refunds (similarly computed) on cottonseed originated and brought to the mill points by other railroads where the outbound shipments of the products are made over its line, and thus would, if taken as it reads, purports to change the tariffs of inbound rates of the other railroads. On the other hand, since the appellee reaches the marketing destinations of the outbound products only through, and under joint rates with, connecting railroads, its tariff (not concurred in by its connections) would, if taken to in fact work reductions in the rates on the outbound shipments, be a tariff under which the appellee was assuming to change the published joint outbound rates by action of itself alone.

The ultimate question presented is whether the action of the Commission, in ordering the appellee to cancel its tariff insofar as it provides for refunds on traffic originated and hauled to the mill points by other railroads, was not within its authority and otherwise lawful. Subordinate questions presented are

1. Whether the Commission either erred or exceeded its authority in determining and finding that the said provision for refunds in appellee's

individual tariff did not conform to the requirements of section 6 (1) and (4), and section 1 (6) of the Act.

2. Whether, in the event the Commission was right and within its authority in reaching such determination, it was not also right and within its authority in determining that the said provision for refunds had no place in the published tariffs and, therefore, that it served only as a "cloak" for the making of unlawful refunds or rebates from the lawfully established rates and charges in violation of section 6 (7) of the Act, and

3. Whether this Court's decision in *Atchison, Topeka & S. F. Ry.* v. *United States*, 279 U. S. 768, supports the appellee's contentions that its tariffs practice is lawful.

STATEMENT

This is a direct appeal from a final decree (R. 71) of the court below enjoining and setting aside, in a suit instituted by the appellee railroad, an order entered by the Commission in a proceeding entitled *Cottonseed Allowances of Columbus and Greenville Railway Co.*, 248 I. C. C. 441.

The proceeding was an outgrowth of an earlier proceeding, *Allowances on Cottonseed at Columbus and Greenville Railway Points*, 238 I. C. C. 309, in which the Commission, following suspension of the appellee's proposed tariff I. C. C. 83, and after hearing, entered an order requiring its can-

cellation. The tariff had been filed to take the place of the appellee's tariff I. C. C. 81 which made provision for a refund, or "cut-back", in connection with the rates to and from mill points on its line on cottonseed and its processed products, such refund being provided for not only in instances where the cottonseed was originated and hauled to the mill points by the appellee but also in instances where it was originated and moved to the mill points by other railroads. Because of this, the later tariff, although it had escaped suspension and become effective, was subsequently criticised by the Commission's Bureau of Tariffs (R. 57). The proposed tariff I. C. C. 83 would have changed the provisions criticised to some extent but the Commission, in finding the provisions as proposed unlawful, also found that they were in substance the same as those contained in the appellee's established tariff 81 (R. 65), and, since its rejection of the tariff proposed in place thereof would leave the established tariff unchanged, it included in the order entered in the suspension proceeding a provision citing the appellee to show cause why its tariff 81 should not be amended to eliminate the provisions in question (R. 65). Subsequently the Commission on its own motion instituted the investigation into the lawfulness of the rates, charges, rules, regulations, and practices, published in appellee's tariff I. C. C. 81—the proceeding here directly involved.

At the hearings held before an examiner the railroads which had been protestants in the suspension proceeding intervened and, by stipulation of the parties, the record and the Commission's report in the suspension proceeding were made a part of the record in the later proceeding (R. 6). Additional testimony and evidence were introduced and, following the hearings, a proposed report of the examiner was served on the parties. The respondent filed exceptions to the report, replies thereto were made by the interveners and the issues were orally argued before the entire Commission. On January 3, 1942, the Commission issued its report in which it found that to the extent the appellee's "Tariff I. C. C. No 81 provides for refund, or cut-back, to the shipper on traffic originated and hauled to the mill points by other rail carriers, it is unlawful in violation of section 1 (6), section 6 (4), and section 6 (7) of the Interstate Commerce Act" (R. 11). The order of the Commission, entered the same day, required the appellee "to cancel such unlawful provisions of said tariff * * *" (R. 12).

Section 1 (6) makes it the duty of all common carriers, subject to the provisions of Part I, to establish, observe, and enforce just and reasonable regulations and practices affecting classifications, rates or tariffs, and prohibits and declares unlawful every unjust and unreasonable classification, regulation, and practice.

Section 6 (1) requires every railroad to file with the Commission and publish schedules showing all the rates, fares, and charges for transportation between different points on its own route, and between points on its own route and points on the route of any other railroad when a through route and joint rate have been established; and where no joint rate over the through route has been established, requires the several carriers in such routes to file and publish the separately established rates applicable to the through transportation.

Section 6 (4) requires that the several carriers which are parties to any joint tariff shall be specified therein and that each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission.

Section 6 (7) provides that no carrier shall engage or participate in the transportation of passengers or property unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of Part I; and that no carrier shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs and the

rates, fares, and charges which are specified in the tariff filed and in effect at the time; and that no carrier shall refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are specified in such tariffs.

In its two reports the Commission covers the facts comprehensively. The appellee, whose line of railroad extends east and west between Columbus and Greenville, Mississippi, serves, together with other railroads, certain mill points where cottonseed transported from country origins in Mississippi and other States is processed into various products which are subsequently shipped outbound to marketing destinations. At Columbus, it connects with lines of the Southern Railway, the Frisco and the Mobile and Ohio. At West Point it connects with the Mobile and Ohio and the Illinois Central, and at Greenville, Greenwood and Moorhead with a subsidiary of the Illinois Central. The junctions mentioned are all mill points and, in addition, there is a mill at Indianola which point is local to the appellee railroad (R. 57).

Under appellee's tariff I. C. C. 81, the "rates and rules" therein published apply:

> (Item 5 (a)) on cottonseed, in carloads, from stations on its line, or received from

connecting lines, and moved to the mill points above named for processing, and the subsequent shipment of the processed products from such points via the appellee's railway; also

(Item 5 (b)) on cottonseed, in carloads, from stations on connecting lines, via such lines to the mill points named (except Indianola) when the processed product is subsequently shipped from such points via the appellee's railway (R. 6, 7).

Subsequent items of the tariff (Ex. C, R. 13) provide, inter alia, that shipments are not to be waybilled at the rates in the tariff but at the full local, or joint, rates lawfully applicable from origin to mill point; that, however, upon evidence of shipment of the processed product via the appellee's railway at the full published rates from the mill point, the freight charges on cottonseed to the mill point will be reduced to the basis of rates shown in item 40, such reduction to be made through freight claim channels (item 15), that is, by refund of part of the inbound charges (item 35). Item 40 provides for a scale of rates based upon the distance of the inbound movement of the cottonseed. The basis for computing the refund is such that when the appellee secures the outbound shipment of products processed from seed brought inbound to the mill point by another railroad the aggregate net amount payable by the shipper for the inbound and outbound movements

is the same as if his traffic were handled both in and out of the mill point by the other railroad. In addition to the condition that the outbound shipment must be made over the appellee's line to entitle a shipper to the refund, the tariff specifies that such shipment must be made within one year from the date of the inbound freight bill and that the claim for refund must be filed within 15 months from the date of the outbound shipment, supported by the original paid freight bill covering the inbound movement, a copy of the outbound bill of lading and a certificate that the claim is bona fide.

As pointed out in the first report (R. 60) there is nothing unusual in the appellee's cut-back tariff as such. Since 1931, for the purpose of meeting truck competition, all the railroads operating in Mississippi have published and maintained so-called cut-back tariffs applying on cottonseed and its products. Under the tariffs of the railroads other than the appellee, however, the cut-back, or refund, is made by a railroad only when both the inbound shipment of the seed and the outbound shipment of the products are over its line. None of them holds out the refund to obtain the outbound shipments of products processed from seed brought to the mill points by any other railroad, or except from seed moved in-bound to the mill points by itself (R. 59). The earlier cut-back tariffs of the appellee were the same in this re-

spect as the other railroads (R. 60). But by its tariff I. C. C. 81, which became effective October 16, 1938, it extended, as above shown, the provision, offering to refund a part of the in-bound charges on the seed when the out-bound shipment of the product is made over its line, to apply even though the in-bound shipment of the seed to the mill point was carried by another railroad (R. 60).

In justification of this before the Commission, the appellee urged in substance that such refunds were necessary to enable it to compete effectively for the outbound traffic; that, under this Court's decision in *A. T. & S. F. Ry. v. United States*, 279 U. S. 768, the outbound movement of the processed products was "free traffic" for which it was entitled to compete whether or not the inbound shipment of seed was originated and transported by another railroad; that its tariff published no rates on such inbound shipments, as that term is generally accepted, but instead provided for an allowance, or refund, which, being published, was lawful; that the tariff was primarily a tariff publishing transit privileges which supplied the machinery for equalizing the rates on the inbound movements to the mill points and outbound movements to destinations over routes of the appellee and its connecting lines with the rates over the routes or lines of the competing railroads (R. 7, 8).

Answering these contentions in its first report, the Commission pointed to the effect of the tariff provision on the joint outbound rates on the processed products to which the appellee was a party, stating that such effect was to work a reduction in those rates without the concurrence of the other participating carriers; that the appellee could not, acting alone, lawfully reduce those rates (R. 62, 63); that the provision for allowances constituted a "device" by means of which the appellee would unlawfully refund a portion of the published joint rates in violation of section 6 (7) of the Act; and that the granting of an *alleged* allowance to the shipper notwithstanding that he performs no part of the transportation service constituted an unreasonable practice in violation of section 1 (6) of the Act (R. 64, 65). The Commission in its first report also deals with the contention that the provision in the appellee's tariff constitutes simply a local transit privilege within the holding of this Court in *Cent. R. R. of N. J. v. United States*, 257 U. S. 247, that

> "Although a joint through route with joint rates is established by concurrent action of several carriers, the transit privilege may thus be granted by a carrier without the consent of and without consulting, connecting carriers."

Referring to this holding the Commission said that (R. 63):

> "Based on the foregoing decision, the Columbus & Greenville would have the right to provide for a transit arrangement on its line. It could provide for the stopping of the commodity at the transit point and the subsequent shipment at the lawfully established joint through rate from original point of shipment to final destination, without the concurrences of its connections, but it could not establish the joint rate itself without such concurrences."

Indicating another tariff means of equalizing rates on "transited traffic" the Commission further said that (R. 63):

> "In several instances the Commission has approved varying proportional rates applicable over a line serving a transit point, but not reaching the origin territory, where the purpose was to equal the balances of the through rates applicable under transit arrangements of carriers originating the traffic and with lines both into and out of the transit point. *Export Rates on Grain and Grain Products,* 31 I. C. C. 616; *Southern Kansas Grain Assn.* v. *Chicago, R. I. & P. Ry. Co.,* 139 I. C. C. 641. * * *"

In its final report, the Commission referred particularly and at some length to the same contention that the appellee's tariff was primarily one publishing transit privileges and simply a means to equalize the net charge to the shipper from origin on another road to final destination

(R. 7, 8), and thereafter it gave consideration to the testimony of a witness of the appellee describing the working of the provision offering refunds on the inbound shipments of the other roads (R. 8, 9). Following this, the Commission, after first emphasizing that the appellee was not a party to the inbound rates of the other railroads and that no other railroad was a party to its tariff providing for refunds, stated, in effect, that, while the refunds, or allowances, so held out by the appellee were in the same amount as those of the other railroads, the essential difference between its practice and that of the other roads was that it held out and made an allowance on seed that it did not originate and carry inbound to the mill points, and absorbed the allowance so made out of its proportion of the outbound joint rates to which it was a party (R. 9). Continuing, the Commission stated in substance that the purpose of the appellee in making the allowance was to enable it to compete for the outbound products thereof by meeting the allowances held out by such roads when originating the inbound shipment; that it was true, as urged by the appellee, that its tariff, offering such allowance, would not be necessary except for the tariffs of the other roads; that, as for the contention of the appellee that, under *A. T. & S. F. Ry.* v. *United States*, 279 U. S. 768, it had the right to offer the same concession as those roads on the ground that the inbound carrier

of the seed had no vested right to the outbound haul of the products milled therefrom, it considered that, while the legality of the tariffs of the other roads was not in issue, the distinction pointed to by them was important, namely, that (R. 10):

> "the tariff of respondent attempts to name rates for account of their lines without their concurrence, whereas their tariffs apply solely on shipments of cottonseed which they transport over their lines to the mill point."

Following this, the Commission pointed to the particular provisions of the statute with which the tariff conflicted, saying (R. 10):

> "Section 6 of the Interstate Commerce Act provides that every common carrier shall publish tariffs showing the charges for transportation between different points on its own line and between points on its own line and points on the line of any other carrier. Where no joint rate over the through route has been established, as in this case, the several carriers in such through route are required to file the separately established rates applicable to the through transportation. The form and manner in which respondent's tariff is published clearly does not conform to the requirements of section 6 (1) and (4) of the act. The refunding of a portion of the rate published and applied by another carrier

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> in the form and manner as that employed by respondent is a practice made unlawful by section 1 (6) of the act.
>
> * * * Upon oral argument it was admitted that respondent had not undertaken the establishment of through routes with joint rates or to accomplish the end desired by proportional rates through procedure authorized by the statute."

As will have been observed, the working of appellee's tariff is that, under it, the appellee offers to refund a part of the rates of a connecting road on shipments of cottonseed brought by the road to a mill point and, if securing in this way the out-bound shipments of processed products for movement to destination via its line, absorbs the refund so made out of its proportion, or division, of the out-bound rates to which it is a party either with the same road or some other connecting road. The refund paid by the appellee is in an amount which equalizes with the rates from country origin on the connecting road to ultimate destination, say, on the same road, the net transportation cost to the shipper, if routing his shipments so as to include the line of the appellee and the practical effect might be said to establish the appellee as party to joint rates with the connecting road from country origin to destination. On the other hand, if it be considered that the in fact effect of the provision is on the joint out-bound rates to which the appellee is a party, the result would be to

work a reduction in those rates down to the basis of proportional rates. The Commission's findings were not made in criticism of the end which the tariff was intended to accomplish, but were to the effect that the form and manner of the provision by which it was undertaken to accomplish the desired end did not conform to the requirements of the Act referred to, with the result that the practice under it, in all of its working ran counter to the basic provisions of the Act governing the publication and observance of tariffs of rates and charges.

In concluding its report, the Commission made plain that there was no objection to the tariff insofar as it provided for the refund on cottonseed originated and carried to the mill points by the appellee itself (R. 11), and, in this connection, it also referred to the proportion of the traffic which was shown of record to be subject to this operation of the appellee's tariff in comparison with the traffic originated by the other railroads and the traffic brought to the mill points by truck, saying:

> "* * * Respondent originates some 15 or 20 percent of the cottonseed milled at the junction points. Some 50 percent of the in-bound seed is brought into the mill points by truck. This leaves some 30 to 35 percent of the total traffic possibly subject to respondent's cut-back on traffic originating on other lines. No provision is made for refund to shippers on that portion of

> the traffic brought into the mill points by truck. * * *."

The Commission's ultimate findings read:

> "We find that to the extent respondent's tariff I. C. C. No. 81 provides for refund, or cut-back, to the shipper on traffic originated and hauled to the mill points by other rail carriers, it is unlawful in violation of section 1 (6), section 6 (4), and section 6 (7) of the Interstate Commerce Act.
>
> An appropriate order will be entered."

PROCEEDINGS IN THE LOWER COURT

On April 3, 1942, the appellee filed its complaint, asking that the Commission's order be enjoined and set aside, naming as defendants the United States, the Commission, and the railroad appellants herein. The defendants so named filed answers denying all material allegations (R. 53–56). On April 24, 1942, the hearing before the specially constituted three-judge court was held, at which hearing a certified copy of the record made before the Commission was introduced in evidence, and the case was orally argued and submitted for decision. On July 31, 1942, the court rendered its opinion holding the Commission's order invalid, and on August 17, 1942, it entered its final decree enjoining and setting aside the order.

SPECIFICATIONS OF ERROR TO BE URGED

The lower court erred

1. In setting aside the Commission's order requiring the appellee to cancel its tariff I. C. C. 81 to the extent that it provides for refund to the shipper on traffic originated and hauled to the mill points by other rail carriers.

2. In finding that appellee's tariff does not affect the out-bound (in-bound, R. 70) rate of connecting carriers.

3. In finding that the out-bound freight rate is in no way affected by the terms of the appellee's tariff.

4. In holding that the appellant railroads' tariffs are very material to a correct solution of the validity of the appellee's tariff.

5. In finding that the appellee's tariff is essentially the same as those of the appellant railroads.

6. In finding that, without its tariff I. C. C. 81, the appellee's right to compete for the outbound freight is destroyed.

7. In substituting its judgment for that of the Commission on administrative matters committed to the Commission by Congress.

SUMMARY OF ARGUMENT

1. The Commission's order requiring cancellation of that part of the appellee's tariff, which provided for reductions, by way of the refund, in the rates on cottonseed hauled inbound to the

mill points by other railroads when the outbound movements of the processed products are made via its line, was within its authority and fully supported by its findings of violations of the provisions of the Act governing the publication, maintenance and observance of tariffs of rates and charges.

The Commission found that the appellee was in no way a party to the inbound rates on seed from origins on the lines of its connecting roads and that no other railroad was a party, by concurrence or otherwise, to its tariff offering the refunds, and that, while the refund was in an amount exactly the same as the refunds made by the other roads, the difference between its practice and theirs was that it made a refund or allowance on seed which it did not originate and haul inbound to the mill points and absorbed the allowances so made out of its proportion, or division, of the joint outbound rates to which it was a party. This practice the Commission found to be unlawful as a whole. Its findings, however, were not made in necessary criticism of the end sought to be achieved by the appellee, namely, the equalizing of the rates on the traffic from origins on the other roads to ultimate destination when the appellee's line was included in the haul with the rates applicable when its line was not so included, but were to the effect that the form and manner of the provision by which it was undertaken to ac-

complish the desired end did not conform to requirements of the Act to which it referred, with the result that the provision, and the practice effectuated by and under it ran counter in all of its working to the basic provisions of the Act governing the publication, maintenance and observance of tariffs of rates and charges.

2. The Commission in its first report developed fully the unlawfulness of the appellee's tariff practice in its effect on the joint outbound rates to which the appellee was a party. It there found that the effect would be to "reduce the lawfully published outbound rates without the concurrence of other carriers participating in the outbound haul"; that, in view of the requirement of section 6 (4) for concurrence of participating carriers, the appellee, acting alone, could not lawfully reduce such joint rates; that the refunds held out by the appellee constituted a "device" by means of which the appellee refunded a portion of the outbound rates in violation of section 6 (7); and that the granting of an alleged "allowance" to the shipper, notwithstanding that he performs no transportation constituted an unreasonable and unlawful practice in violation of section 1 (6).

In its final report the Commission condemned as unlawful the appellee's practice as a whole including the express provisions of its tariff under which the practice was effectuated and whereby it provided for a "cut-back" reduction in the in-

bound rates of other roads in the event the outbound movements of the products of the seed were made via its line. Contrary to the apparent view of the lower court, the Commission's authority over the tariffs filed with it includes authority to order cancelled a tariff provision which provides for an unlawful change in rates without necessity *for determining* that what is expressly and specifically provided for in the published tariff would in fact be effected. Further contrary to the apparent view of the lower court the Commission was not required to determine whether the tariff provision would either render the appellee's division of the joint outbound rates noncompensatory in violation of section 15 (6) of the Act or would work unjust discrimination in violation of sections 2 and 3. The Commission was determining, as it is authorized to do, the question whether the provision was a valid tariff provision conforming to the Act's requirements in respect thereof. Each and every of the Act's provisions governing the publication and observance of the tariffs is necessarily available to the Commission if it is to properly function in its every-day work of passing upon tariff provisions.

3. Following its determination that the tariff provision was unlawful in violation of section 1 (6) and section 6 (1) and (4) of the Act, the Commission in effect found that it resulted from this that the provision had no place in the pub-

lished tariff and that it was, accordingly, left as a provision in the appellee's individual tariff whereby it held out and paid an unlawful refund, or plain rebate, to induce the movement of traffic *via* its line in violation of section 6 (7) of the Act. The first mentioned violations found by the Commission supplied ample support for its order requiring cancellation of the provision, and the further violation is one of particular importance under the Act.

4. This Court's decisions in *Atchison, T. & S. F. Ry.* v. *United States,* 279 U. S. 768, and in *United States* v. *Chicago, M. St. P. & Pac. Ry.,* 294 U. S. 499, advanced by the appellee in justification of its tariff practice do not support its contention that its practice is lawful.

ARGUMENT

I. The Provision in the Appellee's Individual Tariff for Reductions, by Way of the Refund, in the Rates of Other Railroads Conflicts With the Fundamental Provisions of the Act Governing the Publication, Maintenance, and Observance of Tariffs of Rates and Charges

1. The Tariff, in its Express Provisions, Reducing by Way of the Refund, the Inbound Rates on Cottonseed of Other Railroads, When the Outbound Movements of the Processed Products are Made *via* Its Line, Conflicts With the Provisions of Section 6 (1) and (4) and Section 1 (6) of the Act

As shown in the preliminary statement the appellee's tariff I. C. C. 81 provides expressly and in detail for reductions, by way of the refund, in

the inbound rates on cottonseed not only when the movement to the mill point is over its own line but also when it is over the line of another railroad, the refund in both cases being conditioned upon the outbound shipment of the processed products being made *via* the appellee's line. The appellee is shown by the record to originate a considerable proportion of the seed milled at the junction points (R. 11), and, presumably, is able to secure for movement *via* its line substantially the same proportion of the outbound shipments of the processed products, since none of the "cut-back" tariffs of the other railroads apply except in respect of outbound shipments of products processed from seed brought inbound to the mill points by the road publishing the tariff. In endeavoring to increase its proportion of the outbound traffic by the same tariff means of a "cut-back" reduction in rates, but in the rates of other roads, the appellee is unquestionably in conflict with the provisions of the Act governing the publication and observance of tariff rates and charges.

The appellee, while having a number of mill points scattered over its line, reaches the marketing centers of the products of the cottonseed only through, and under joint rates with, its connecting roads. Its "cut-back" tariff does not purport to reduce these rates; insofar, however, as it does in fact work such a reduction, it is unlawful because lacking the concurrence of the other roads.

parties with it to the joint outbound rates, and because of conflict with other provisions of the Act. The Commission in its two reports condemned the tariff as unlawful both in its express application to the inbound rates and in its effect, or working on the joint outbound rates. The lower court also considered the tariff from both standpoints, holding, among other things, that (R. 70):

> A clear analysis of plaintiff's tariff demonstrates that it in nowise affects the amount of the rates paid for the inbound service to the mill point. It does not affect the outbound rate of connecting carriers. But the refund is absorbed entirely by the plaintiff * * *.

In addition to the obvious error of the court in concluding that neither the inbound nor the outbound rates were affected because the refund was absorbed by the appellee, it should be noted that the court's holding assumes that so long as a tariff's irregularities do not affect the rates, its failure to conform to the requirements of section 6 and section 1 (6) would not warrant its condemnation.

Giving consideration first to the tariff in its express language, proffering a refund on shipments of seed brought inbound to the mill points by other roads: The appellee, when securing in this way an outbound shipment of products processed from such seed, presumably absorbs the re-

fund out of its division of the outbound joint rate to which it is a party. By its tariff, however, the appellee provides, the same as when the shipment of seed moves inbound over its road, for a reduction, by way of the refund, in the inbound rate, and requires that the original paid inbound freight bill be submitted by the shipper. The refund is computed by application of the distance scales in the appellee's tariff to the distance from the origin of the inbound shipment on the other railroad to the mill point and is exactly in the same amount as held out by the tariff of the other railroad.

The Commission's report (R. 8–9) sets out testimony of a witness of the appellee with respect to the working of the tariff in respect of an inbound shipment over the Y. & M. V. Railroad (a subsidiary of the Illinois Central) from Coahoma, Miss., to Greenville, a distance of 87 miles. As shown by the witness, the rate of the Y. & M. V. from Coahoma to the mill point of Greenville is 8.4 cents per 100 pounds and it is collected by that road when the seed moves to Greenville. On the outbound shipment of products to Cincinnati, which the witness assumes to be made *via* the line of the appellee, the full joint rate of 48 cents by way of the appellee and its connections is collected by the appellee, which subsequenty refunds "the shipper to basis of rate set forth in its tariff for 87 miles, or 7 cents," making the net cost "7 cents

to Greenville, plus 48 cents beyond, or a total of 55 cents." Further testimony of the witness shows that the procedure followed and the result attained are the same where both the inbound and outbound shipments are assumed to be routed over the Y. & M. V. (R. 9).

Following the illustration of the working of the tariff given in the report, the Commission first emphasized that the appellee was in no way a party to the inbound rates on cottonseed of its connecting roads and no other railroad was a party to its tariff providing for the refunds, and it then stated, in effect, that while the refunds or allowances so held out by the appellee were exactly the same in amount as those of the other railroads, the difference between its practice and the practice of the other railroads was that it held out and made an allowance on seed that it did not originate and carry inbound to the mill points and absorbed "the allowances so made out of its proportion of the joint outbound rates to which it was a party." The appellee's purpose in making the refund, the Commission stated, was to enable it to compete for the outbound products of seed carried inbound by the other roads, which latter held out such a refund when originating the inbound shipments. Since such inbound shipments of the other roads, the Commission further in effect said, moved to the mill points at the local rates, under separate bills of lading, the appellee

would have been under no necessity to offer a rate refund on them except that the originating and transporting roads did so. (R. 9–10.) Answering the appellee's contention that, under *A. T. & S. F. Ry.* v. *United States*, 279 U. S. 768, it had the right to offer the same concession as those roads, on the ground that the inbound carrier of the seed had no vested right to the outbound haul of the products milled therefrom, the Commission said that, while the legality of the tariffs of the other roads was not in issue, the distinction pointed to by them was important, namely, that the appellee's tariff attempted to name rates for account of their lines without their concurrence, whereas their tariffs applied solely on inbound shipments of seed which they themselves transported. The Commission then referred to the provisions of the Act with which the appellee's tariff practice was in conflict, saying (R. 10–11):

> "Section 6 of the Interstate Commerce Act provides that every common carrier shall publish tariffs showing the charges for transportation between different points on its own line and between points on its own line and points on the line of any other carrier. Where no joint rate over the through route has been established, as in this case, the several carriers in such through route are required to file the separately established rates applicable to the through transportation. The form and manner in which respondent's tariff is pub-

> lished clearly does not conform to the requirements of section 6 (1) and (4) of the Act. The refunding of a portion of the rate published and applied by another carrier in the form and manner as that employed by respondent is a practice made unlawful by section 1 (6) of the Act."
>
> "'Respondent provides the same cut-back for cottonseed originating on its line which it brings into the mill points as do the other carriers serving those points. No objection is made to that practice. * * *."

Section 6 (4) of the Act, referred to in the above, requires, as shown in the preliminary statement, concurrences of all participating carriers in joint tariffs, and section 1 (6) makes it the duty of the carriers to establish and observe just and reasonable regulations and practices affecting classifications, rates, or tariffs, and prohibits and declares unlawful every unjust and unreasonable classification, regulation, and practice.

As above shown, the Commission had succinctly described the appellee's tariff practice by its finding that its said practice was to make a refund, or allowance, on seed which it did not originate and carry inbound to the mill points, and to absorb the allowances so made out of its proportion of the outbound joint rates to which it was a party. This practice the Commission condemns as a whole. As pointed out in the preliminary statement, however, the Commission's findings are not

made in criticism of the end sought to be accomplished by the tariff but are to the effect that the form and manner of tariff provision by which it is undertaken to accomplish such end do not conform to the requirements of the Act mentioned, with the result that the provision itself and the practice under it, in all its working, necessarily conflicts with the same requirements.

It is plain that the provision for reductions, by way of the refund, in the inbound rates on seed of the other roads is not a provision which conforms to "the requirements of section 6 (1) and (4) of the Act" and also that it is a provision for "the refunding of a portion of the rates published and applied by" other carriers which unquestionably constituted an unreasonable and unlawful practice in violation of section 1 (6) of the Act. As found by the Commission, the appellee was not a party to the inbound rates of the other roads which its cut-back tariff purported to reduce and none of the railroads publishing those rates, nor any other railroad, was a party by concurrence, or otherwise, to its cut-back tariff (R. 9, 10). Contrary to the apparent view of the lower court (R. 68), these were findings of fact and predicated on them, it was manifest that the provision of the tariff for a "cut-back" reduction in the inbound rates of the other roads did not conform to, but was in conflict with, and violative of, the provisions of the Act referred to.

2. The Appellee's Tariff and Its Practice Effectuated by and Under the Tariff Are Also Unlawful in Their Effect and Working on the Joint Outbound Rates

As has been already emphasized, the Commission, following analysis thereof, stated that the appellee's tariff practice (in contrast with that of the other roads) was to make a refund, or allowance, on seed that it did not originate and carry inbound to the mill points, and to absorb the allowances so made out of its division of the joint outbound rates to which it was a party (R. 9).

In respect of the appellee's practice in its application to the inbound rates of other roads the lower court said (R. 70):

> "A clear analysis of plaintiff's tariff demonstrates that it in no wise affects the amount of the rates paid for the inbound service to the mill point."

Even assuming this statement to be correct, it is a narrow and new view of the Commission's authority over the tariffs to consider that it is without power to order cancelled a tariff provision which provides for an unlawful change in rates except as it determines that what is expressly and specifically provided for in the published tariff would in fact be effected. There is no place in the tariffs for any such provisions. In any event, it is obvious that the Commission's condemnation of the tariff provision and the ap-

pellee's practice effectuated by and under it includes any of its unlawful working whether in respect of the inbound or the outbound rates.

The Commission in its first report developed fully the unlawfulness of the appellee's tariff practice in its effect on the outbound rates. It there said that the effect of the practice would be "to reduce the lawfully published outbound rate without the concurrence of other carriers participating in the outbound haul"; that, in view of section 6 (4) of the Act, the appellee, acting alone, could not lawfully reduce such joint rates (R. 62); that the refunds held out by the appellee constituted a "device" by means of which the appellee would refund a portion of the joint outbound rates in violation of section 6 (7) of the Act (R. 65); and that the granting of an alleged allowance to the shipper, notwithstanding that he performs no transportation service constituted an unreasonable practice in violation of section 1 (6) of the Act.

The lower court appears rather to have been under a misapprehension as to the nature of the issues involved, this being shown by its statement, among others, that (R. 68):

> "The testimony shows without dispute that this tariff is profitable to plaintiff; that by its provisions and enforcement none of the capital investment of plaintiff is impaired; * * *. The Commission did not find that the tariff was unreasonable, unjust or discriminatory, but determined

> that the form and manner in which the tariff is published does not conform to the requirements of Section 6 (4) and 6 (7) of the Act, and that it was unlawful by virtue of Section 1 (6) of the Act. The Commission was without power to declare the tariff unlawful unless it found from the evidence as a fact that the tariff was in violation of 6 (4) or 6 (7) or otherwise violated 1 (6)."

Undoubtedly the Commission condemned the form and manner of the tariff provision by which the appellee sought to accomplish its ends, but the form and manner[1] of establishing tariff rates and charges, or changes therein, is governed by the statute and has long been regarded as committed to the Commission's supervisory and administrative authority as one of its most important functions. The appellee is but one of the railroads serving the mill points, doing so in part individually and in part under joint rates with other roads. It is not apparent that its traffic has suffered from the severe truck competition more than that of the other roads (R. 11, 60, 61) and, in any event, it seems plain that it cannot seek to stimulate the traffic moving via its line by providing in its strictly individual tariff for a refunding of a part of the inbound rates of other roads, whether the result is to in fact reduce those rates or to work a reduction in the established

[1] Cf. *Export Rates on Grain*, 31 I. C. C. 616, 619, and *Grain Asso.* v. *C., R. I. and P. Ry.*, 139 I. C. C. 641, 655, the first referred to in first report (R 64)

joint outbound rates to which it is but one of the parties. This form and manner of improving its competitive situation, adopted by the appellee, is more simple and, if it were lawful, would doubtless be more certain than the steps lawfully open to it to achieve its own particular ends, but it is difficult to see just how it could be considered as conforming to the tariff requirements of the Act or any sound tariff requirements.

The Commission was not determining whether the tariff provision would either render the appellee's division of the outbound rates noncompensatory in violation of section 15 (6), or whether it would work unjust discrimination in violation of sections 2 or 3, but was determining whether it was a valid tariff provision conforming to the Act's requirements in respect thereof. And, as pointed out above, the Commission's conclusion that it was not such a valid provision was predicated upon findings which were of fact and which showed it to be a conclusion amply warranted by fact and reason.

3. The Commission, Having Determined That the Provision in the Appellee's Individual Tariff for Rate Refunds was Unlawful, it Followed That the Provision Had no Place in the Published Tariffs and, Therefore, Served Only as a "Cloak" for the Making of Unlawful Refunds From the Published Rates and Charges in Violation of Section 6 (7) of the Act

It should first be emphasized that the provision in the appellee's tariff in question, having been condemned as in conflict with the requirements of

section 6 (1) and (4) and section 1 (6) of the Act, these violations, of themselves, supplied ample support for the Commission's order requiring cancellation of the provision. The fact, however, that the provision was unlawful and, therefore, could not be considered as constituting a valid change in any of the rates involved, left it without any valid operation and, accordingly, as a provision in the appellee's individual tariff whereby it held out and paid an unlawful refund, or plain rebate, to induce the movement of traffic via its line in violation of section 6 (7) of the Act.

In this connection the Commission's first report reads (R. 64):

> "* * * Section 6 (7) provides, among other things, that no carrier shall 'charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates * * * which are specified in the tariff filed and in effect at the time', and, further, that no carrier shall 'refund or remit in any manner or by any device any portion of the rates * * * so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.' The word 'tariffs' as used in section 6 (7) must be interpreted as meaning joint tariffs, when considering joint rates.* * *

> In our opinion the allowances proposed by respondent would constitute a 'device' by means of which it would refund a portion of the rates specified in joint tariffs now lawfully on file with the Commission. The fact that the refund would be made out of respondent's division of the joint rate would be immaterial. Such a refund would be, essentially, a rebate,* * *."

The fact that a rebate is no less unlawful because paid under cloak of tariff publication is, of course, well settled. The question, as arising under section 6 (7) of the Interstate Commerce Act, has generally involved alleged allowances published and paid to shippers under section 15 (13) of the Act on the assumption that the shipper was performing for the carrier some part of the transportation service included in the rates he paid. *United States* v. *American Tin Plate Co. et al.* (*Terminal Allowance Cases*), 301 U. S. 402, involved orders of the Commission requiring the Pennsylvania and other railroads to desist from paying allowances (pursuant to published tariffs) to certain large industrial plants for the "spotting" of cars at points of unloading within the plants. The railroads delivered the cars to the plants by placing them on so-called interchange, or "hold", tracks, from which they were subsequently taken by the plant locomotives at times and to places suiting the needs and work of the plants. The Commission in its reports deal-

ing with the plants in question held, in effect, that the "spotting" done was the plants' own work and not that of the railroads covered by the rates and that, accordingly, the allowances paid therefor constituted unlawful refunds in violation of section 6 (7) of the Act. This Court, referring to the contentions of the plants, said (406):

> "* * * They point out that the Commission held that an allowance furnished a means whereby an industry enjoyed a preferential service not accorded to shippers generally, and constituted a refund or remission of a portion of the rate for transportation in violation of section 6 (7) of the Interstate Commerce Act. They assert these conclusions are insufficient to support a cease and desist order because the Commission has not found, as it must to bottom an order on sections 2, 3 and 15 (1) of the Act, that the practice was unreasonable, unjustly preferential, unduly discriminatory, or otherwise unlawful. Respecting section 6 (7) they say that as, by that section and section 15 (13), allowances to shippers who perform a part of the service of transportation are permissible if tariffs setting forth the nature and amount of the allowance are duly filed, as they were in the present instance, it cannot be an unlawful refund or rebate for the carriers to make the allowances which the tariffs specify. If the findings were limited to the practices specified in the sec-

> tions mentioned the position of the appellees would no doubt be sound, but the Commission has, in each case, found that the interchange tracks of the respective industries are reasonably convenient points for the receipt and delivery of interstate shipments and that the industry performs no service beyond those points of interchange for which the carrier is compensated under its interstate line-haul rates. * * * The Interstate Commerce Commission is authorized and required to enforce the provisions of the Act and, after hearing, if it be of opinion that any regulation or practice of a carrier be unjust or unreasonable, or unjustly discriminatory, 'or otherwise in violation of the provisions of this act', to determine what practice is or will be just, fair and reasonable to be thereafter followed and to make an order that the carrier cease and desist from violation to the extent that the Commission finds violation does or will exist."

The above decision and that in *United States* v. *Pan-American Petroleum Co.*, 304 U. S. 156, made plain that if a published "allowance" to shippers is in fact an unlawful refund, or rebate, the fact that it is published in the tariffs does not save it from the condemnation of section 6 (7) of the Act. And here there is not even the claim that the refunds are "allowances" paid to shippers for transportation services performed (R. 62). Another decision in which unlawful allowances,

although published in the tariffs, were held to be rebates is *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501, 511. There this Court said that

> Where a forbidden discrimination is made, the mere fact that it has been long continued and that the machinery for making it is in tariff form, cannot clothe it with immunity. See *Louisville & Nashville R. Co.* v. *Interstate Commerce Commission,* 282 U. S. 720 * * *.

To the same effect: *Int. Com. Comm.* v. *Baltimore & Ohio R. R.,* 225 U. S. 326, 345; *Chicago & Alton Ry.* v. *United States,* 156 Fed. 558, 560; *Cent. Railroad Co. of New Jersey* v. *United States,* 229 Fed. 501, 507–509; *Gallagher* v. *Pennsylvania R. R.,* 160 I. C. C. 563, 568.

In the excerpt above quoted from the Court's opinion in the *American Sheet and Tin Plate Co. case,* it will be noted that the appellees contended, among other things, that the Commission's conclusions under section 6 (7) were not sufficient to support its cease and desist order and they appeared to be of the view, somewhat similar to that of the lower court in this case (R. 68), that an order of the Commission had to be bottomed on findings of the Commission under sections 2 and 3 or other particular sections of the Act. The answer to that is, as appears in the Court's opinion, that section 15 (1) of the Act authorizes and requires the Commission to enforce the Act

by its orders if, after hearing, it is of opinion that any regulation or practice of a carrier is unjust or unreasonable or unjustly discriminatory "or otherwise in violation of the provisions of this Act."

In the present case, while the Commission's order rests in part on its finding that the refund is unlawful under section 6 (7), that finding is led up to and rests on its findings that the appellee's tariff practice is unreasonable and unlawful under section 1 (6) and that it conflicts with, and is violative of, section 6 (1) and (4) of the Act. Each and every one of these provisions is necessary available to the Commission if it is to properly function in the everyday work committed to it of passing upon tariff provisions.

II. The Right Which the Appellee, or any Railroad Serving the Mill Points, Has to Participate in (as "Free Traffic") the Outbound Movements of Products Processed From Seed Hauled Inbound by Other Roads Does Not Include the Right to Resort to "Self-Help" in Form and Manner Violating the Provisions of the Act Governing the Publication, Maintenance and Observance of Tariffs of Rates and Charges

As pointed out in the preliminary statement, the appellee's tariff practice has, and was, apparently, designed to have, the effect in practical working of establishing it as a party to through routes and joint rates without the concurrence of other railroads concerned. Under it, the appellee offers to refund a part of the local inbound rates on seed

hauled from origins to mill points by other roads and, when securing in this way an outbound shipment of processed products for movement to destination *via* its line, absorbs the refund so made out of its division of joint outbound rates to which it is a party. The refund paid by the appellee is in an amount which equalizes with the rates from country origin on the connecting road to ultimate destination on another, or perhaps the same, road, the net transportation cost to the shipper, if routing his shipment so as to include the line of the appellee; and the practical effect is, as above said, to establish the appellee as an intermediate line in a through route and joint rate with its connecting road, or roads, from country origin to final destination. In justification, apparently, of this result, the appellee relied before the Commission on this Court's decision in *Central R. R. Co. of N. J.* v. *United States,* 257 U. S. 247, and urged that its tariff was primarily a local tariff publishing transit privileges; that it named no rates but was simply a means to equalize the net charge to the shipper for the total haul from origin to destination. The Commission in its first report dealt with this contention by first quoting from the Court's opinion in the case in question, and thereafter making brief comment thereon as follows (R. 63):

> "Under the rules of the Commission governing the making, filing and publishing of tariffs, privileges like creosoting in

transit are treated as a matter local to the railroad on which the transit point is situated. Whether the privilege shall be granted or withheld is determined by the local carrier. If granted, the local carrier determines the conditions; and these are set forth in the local tariff. Although a joint through route with joint rates is established by concurrent action of several carriers, the transit privilege may thus be granted by a carrier without the consent of and without consulting, connecting carriers. And the whole revenue received for use of the privilege is retained by the local carrier.

"Based on the foregoing decision, the Columbus & Greenville would have the right to provide for a transit arrangement on its line. It could provide for the stopping of the commodity at the transit point and the subsequent shipment at the lawfully established joint through rate from original point of shipment to final destination, without the concurrences of its connections, but it could not establish the joint rate itself without such concurrences."

In its final report the Commission also referred to the appellee's contention that its tariff simply established a transit privilege by equalizing with the rates applying on the seed and its products from origins on other roads to final destinations the net charge to the shipper for the total haul when its line was included therein (R. 7, 8) and,

thereafter, following its consideration of the testimony of the appellee's witness (R. 8, 9), its findings as to the appellee's practice (R. 9), and its summary of section 6 (1) of the Act (R. 10), it found, as above set out, that the appellee's tariff did not conform in form and manner to the requirements of section 6 (1) and (4) and section 1 (6) of the Act, and in the succeeding paragraph it stated that (R. 11):

> "Upon oral argument it was admitted that respondent had not undertaken the establishment of through routes with joint rates or to accomplish the end desired by proportional rates through procedure authorized by the statute."

In short the Commission's findings were not directed against the end which the appellee's tariff was intended to accomplish. As first in effect stated in its earlier report, the Commission did not consider that the manner of accomplishing its end adopted by the appellee was sanctioned by the decision in *Cent. R. R. of N. J. v. United States, supra,* as a substitute either for the establishment of through routes and joint rates or the steps necessary to establish the out-bound rates on a proportional basis. Doubtless these steps were neither direct nor certain as to results but that fact did not justify the appellee's resort to "self-help" by means in conflict with the statute's requirements, nor could it warrant the Commission

in disregarding the violations of basic provisions of the Act involved.

In further justification of its practice of making a refund, or allowance, on seed originated and hauled to the mill points by other railroads, the appellee, it will be recalled, contended that, since the said originating and transporting roads made such refund, it had the right to make the same concession on the ground that under this Court's decision in *Atchison, T. & S. F. Ry.* v. *United States*, 279 U. S. 768, the in-bound carrier of the seed had no vested or inherent right to the out-bound haul of the products milled therefrom. The facts of the *Atchison Case* are given in a succinct illustrative statement in the headnotes which reads:

> "The plaintiff railroad offered standard rates on wheat over its line from Dodge City to Kansas City, a primary grain market, and from Kansas City to the Gulf, and a through rate from Dodge City via Kansas City to the Gulf which was lower than the sum of the standard rates. Under the practice known as 'through rates with transit privilege,' owners of wheat which, within a certain period, had been shipped from Dodge City to Kansas City without other destination and for the standard rate between those points, could reship the same or substituted wheat from Kansas City to the Gulf by paying only a 'proportional rate' or 'balance of the through rate,' al-

lowing them a discount equal to the difference between the through rate from Dodge City to the Gulf and the sum of the standard rates. To overcome the competition of a railroad with a line from Kansas City to the Gulf which offered a lower rate from Kansas City to the Gulf on wheat which had originated in Dodge City, the plaintiff filed a tariff increasing its standard rate from Dodge City to Kansas City applicable only to such wheat as should later be reshipped from Kansas City to the Gulf over the competing line; and it contended that the Interstate Commerce Commission was without power to set aside the increase, though unreasonable and discriminatory, because, by so doing, it compelled the plaintiff to participate in a through route and rate with the competing carrier and thereby short-haul itself, in disregard of the limitations imposed by paragraph 4 of section 15 of the Interstate Commerce Act on the Commission's power to establish through routes."

The Commission found unreasonable and ordered cancelled the Atchison's proposed in-bound rate and its action was upheld, the Court holding that there was nothing in Section 15 (4)[2] of the

[2] Section 15 (3) and (4)—set forth in the appendix—empower the Commission to establish through routes and joint rates when found to be in the public interest, subject to the proviso that it may not require any railroad to join in a through route that short hauls it except upon the findings prescribed in paragraph (4).

Act which restricted the Commission's authority to pass on the reasonableness of rates and that, as for the Atchison's contention that its proposed conditional in-bound rate was not filed as a just and reasonable rate but rather as a prohibitory rate in exercise of its section 15 (4) right to withdraw from a through route which short-hauled it (775), the contention rested upon a fiction, for the in-bound and out-bound movements of the grain in question were independent and distinct, and the fiction of a "through rate with transit privilege" could not convert them legally into a through movement. This decision in no way indicates that administrative judgment in respect of proportional rates, "transit balances" and the like, as predicated upon the fiction of a "through rate with transit privilege", is precluded or restricted but on the contrary emphasizes the broad authority of the Commission over rates and the fact that the general practice antedates the enactment of the Act to Regulate Commerce (606). The Atchison was asserting a special legal right and the answer made to this was that such a right could not rest upon a fictional basis.[20]

It is difficult to understand just why the appellee considers that the decision in the above case supports its claim of right, in competing for the

[20] The decisions in *B. & O. R. R.* v. *U. S.*, 24 F. Supp. 734 and *B. & O. R. R.* v. *Settle*, 260 U. S. 166, 171 deal with another "legal" angle.

outbound traffic in question, to resort to the tariff means of holding itself out to refund a portion of the inbound rates of other roads if the shipment of the outbound products is made *via* its line. The tariff means adopted by the Atchison to hold the traffic to its line was, as above shown, to publish a "prohibitory" inbound rate to become applicable if the outbound shipment was made over the line of its competitor. Even though the Atchison had had the inherent right which it asserted to hold the traffic to its line, it is apparent that the decision recognizes that the tariffs are not available for its enforcement by way of a "prohibitory" rate since it would still have been within the authority of the Commission to declare it unreasonable and order it cancelled.[4] Moreover, the Atchison's experimentation with the tariffs was confined to its own rates.

Chiefly, it would seem, the appellee is attempting to attack in this case, in which its particular tariff practice alone is in issue, the validity of the "cut-back" tariffs of the other roads. This is made doubly apparent by its considerable reliance upon the decision in *United States* v. *Chicago, Milwaukee, St. P. & Pac. R. R.;* 294 U. S. 499. There the Milwaukee filed a schedule proposing to reduce its rates on coal from Indiana to the Chicago market to place them on a parity with the intrastate rates from origins in Illinois. The Commission, in a suspension proceeding, found

[4] Cf. *Virginian Ry.* v. *U. S.*, 272 U. S. 658, 666.

the Milwaukee's proposed rates unreasonably low and ordered them cancelled. This order of the Commission the Court reversed because of an inadequate basis in fact to support the finding. The Commission, in making the finding had relied considerably on its belief that the Milwaukee's proposed rate reduction would bring about a disruption of the coal rate structure and, while it expressed the view that the Illinois-Indiana rate adjustment might be in need of correction, it said that this should not be done in piecemeal fashion. The Court pointed out that it was within the power of the Commission to make such correction as was needed, whereas the Milwaukee had available to it only the means which it adopted of initiating reduced rates. It is this latter comment of the Court upon which the appellee principally relies, its position being apparently that the Commission should not have required its tariff to be cancelled, however unlawful it might have been, without first examining into the tariffs of the other roads, to meet the competition of which, it had resorted to the filing of such tariff. But the Commission's order in the *Milwaukee Case, supra,* was not set aside because it had not undertaken the correction of the Illinois-Indiana rate adjustment but because its conclusion of rate unreasonableness was not supported by adequate findings. And the method of "self-help" used by the Milwaukee

cannot be said to have any kinship to that employed by the appellee and involved in this case.

The Commission's statement that the tariffs of the other roads were not in issue was occasioned by the fact that much of the appellee's defense of its particular tariff practice consisted of an attack on the other roads' quite different practice. That the Commission did not consider the latter objectionable seems to follow from its finding that (R. 10, 11):

> "Respondent provides the same cut-back for cottonseed originating on its line which it brings into the mill points as do the other carriers serving those points. No objection is made to that practice."

Furthermore, the Commission in its first report (R. 60) stated that "transit and similar arrangements, such as provided by these cut-back tariffs are generally conditioned upon, or granted in consideration of, the obtaining of the out-bound haul of the products by the in-bound carrier to the transit point." The Commission plainly did not consider that the appellee was incurring any greater loss of traffic from the truck competition than the other roads (R. 11, 60, 61), and it is apparent that it did not consider that the cut-back practice minus the variation initiated by the appellee called for investigation.

CONCLUSION

It is respectfully submitted that the decree of the court below should be reversed with directions to dismiss the bill for want of equity.

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APPENDIX

Interstate Commerce Act, 49 U. S. C. 1, et seq.:

SEC. 1. (6) It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provision of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

SEC. 6. (1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation be-

tween different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

SEC. 6 (4) The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the

parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

SEC. 6 (7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

SEC. 15. (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any com-

plaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

SEC. 15. (3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after

full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

SEC. 15. (4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of the railroad and of any intermediate railroad

operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

SEC. 15 (13) If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and

allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

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